

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. SMITH

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AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,

V.

SCOTT A. SMITH, APPELLANT.

Filed June 12, 2012. No. A-11-1010.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge.
Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Scott A. Smith appeals from the decision of the district court for Lancaster County finding Smith guilty of driving under the influence of alcohol (DUI), third offense, enhanced by his refusal to submit to a chemical test. Smith was sentenced to 2 to 4 years in prison and his drivers' license was revoked for 15 years. For the reasons that follow, we affirm the decision of the trial court.

BACKGROUND

On November 10, 2010, Rosalyn Beckman reported an accident occurring north of Waverly Road in rural Lancaster County. Beckman reported that she was waiting in her car in her driveway to enter the road when a green Toyota Camry strayed across the road and clipped the front of her car. Beckman said the driver stopped, she asked him if he was all right, and he said "just taking care of myself" before driving off without exchanging information. A Deputy Goodwater responded in his personal vehicle, because he was off duty but lived on the same

road. Beckman told Goodwater the green car headed westbound, and Goodwater went in that direction.

Goodwater found the car parked in the center of the road, running, with one occupant, later identified as Smith. Goodwater asked Smith if he was hurt and noticed Smith had slurred words, watery eyes, and the odor of alcohol. Goodwater also saw paint transfer and damage to the front end of Smith's car consistent with the collision with Beckman's car. Goodwater noted Smith's behavior was inconsistent--he was alternately calm and aggressive. Goodwater concluded Smith was intoxicated and asked the responding deputies to come to his location. A Deputy Hansen and a Deputy Ziemer arrived. Ziemer found a nearly empty 1.75 liter bottle of vodka on the passenger floorboard as well as an empty can of beer and five unopened cans of beer.

Hansen arrived and placed Smith in the cruiser. Goodwater moved Smith's car from the middle of the road and noted the very strong odor of alcohol. Smith admitted he had been drinking but would not say how much he had, and he agreed to take a preliminary breath test and perform some field tests. During the 15-minute waiting period, Smith's mood shifted severely, he became physically and verbally combative, and he refused to take the test. At that point, Smith was formally arrested and taken to jail. He was read the postarrest advisement, and when Hansen left the jail, he could still hear Smith yelling and beating the door of his cell, threatening other people and trying to start a fight.

Smith was originally charged with DUI, third offense, aggravated by a test of over .15 or with refusal of a chemical test. Smith filed a motion to quash and a plea in abatement, both of which were overruled. Smith waived his right to a jury trial and chose to submit to a stipulated trial. Immediately before trial, the charge was amended without objection to DUI, third offense, aggravated by a test refusal. The State added an allegation that Smith refused to submit to a chemical test of blood, breath, or urine, as required by Neb. Rev. Stat. § 60-6,196 (Reissue 2010). Smith renewed his motion to quash and plea in abatement, which were again overruled.

The trial court held a stipulated bench trial, and the matter was submitted to the court on exhibits 1 through 6. The court found Smith guilty. The enhancement hearing immediately followed, and the State offered exhibits 7 and 8, both prior DUI convictions. Smith objected on the basis that a prior DUI conviction cannot be used to enhance a refusal conviction. The court overruled the objection and received the exhibits. The court found beyond a reasonable doubt that Smith had been convicted of DUI twice and found him guilty of third-offense DUI enhanced as set forth in the amended information. On November 3, 2011, Smith was sentenced to 2 to 4 years in prison and his license was revoked for 15 years. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Smith alleges the district court erred in (1) failing to sustain his motion to quash and subsequently convicting him of the charges; (2) enhancing his refusal conviction, as the prior DUI's used to enhance such conviction were not admissible under the statutes; and (3) imposing an excessive sentence.

STANDARD OF REVIEW

Questions of law presented by a motion to quash are reviewed independently of the lower court's conclusions. *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007). A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including in the form of the indictment or the manner in which an offense is charged. Neb. Rev. Stat. § 29-1808 (Reissue 2008).

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

ANALYSIS

Failure to Sustain Motion to Quash and Subsequent Conviction.

“[N]o person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit.” Neb. Rev. Stat. § 29-106 (Reissue 2008). Smith argues that Nebraska law classifies DUI and refusal as separate and distinct offenses and that the State charged him with a “hybrid offense of DUI/refusal.” Brief for appellant at 9.

In addition, Smith cites *State v. Hansen*, 16 Neb. App. 671, 676-77, 749 N.W.2d 499, 504 (2008), where this court stated “when a judge is sentencing for a violation of our DUI statute, the present offense can be enhanced by prior DUI convictions, and when a judge is sentencing for refusal, the offense then before the court can be enhanced, but only by prior refusal convictions.” Smith argues as an extension of this logic that “if the State is asserting that an accused has committed the offense of refusal, then only refusal convictions can be used to enhance said conviction.” Brief for appellant at 16.

However, Smith was not charged or convicted of *refusal*, but, rather, he was charged under Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2010). The refusal was simply an aggravating factor under § 60-6,197.03, which states in relevant part:

(6) If such person has had two prior convictions *and, as part of the current violation*, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath or *refused to submit to a test as required under section 60-6,197*, such person shall be guilty of a Class IIIA felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. The court shall also sentence such person to serve at least one hundred eighty days' imprisonment in the city or county jail or an adult correctional facility.

(Emphasis supplied.)

Further, the circumstances in *State v. Hansen, supra*, are different than those in the instant case. In *Hansen*, the trial court used a prior conviction for refusal to enhance a DUI conviction, and we found the refusal was not within the statutorily listed prior convictions for a DUI conviction. In this case, the situation is exactly as it is stated in the statute; there was evidence of two prior DUI convictions, and, as part of the current DUI offense, Smith refused to submit to a test as required under Neb. Rev. Stat. § 60-6,197 (Reissue 2010). An independent review of the evidence reveals that the amended information correctly identified the charges against Smith and that this offense is recognized by Nebraska law. The motion to quash was appropriately overruled.

Enhancement.

In his second assignment of error, Smith argues that the two prior DUI convictions are not admissible to enhance his refusal conviction. However, as set forth above, Smith was not charged with, or convicted of, a refusal offense. Rather, he was charged with, and convicted of, DUI, and his refusal was simply a factor qualifying the offense as a Class IIIA felony under § 60-6,197.03(6).

Excessive Sentence.

Smith argues the sentence imposed by the district court is excessive. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

Section 60-6,197.03(6) sets out the crime charged, and Smith was convicted of a Class IIIA felony. Class IIIA felonies are punishable by a maximum of 5 years in prison, a \$10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 2005).

The sentence of 2 to 4 years in prison imposed by the district court is within the statutory guidelines. The district court took into account Smith's participation in intensive outpatient treatment, but could not ignore the accident caused by Smith and that he did not stop and exchange the requisite information with the driver of the other car. In addition, this was Smith's seventh DUI arrest and his fifth conviction. The court found that there was a substantial risk that Smith would reoffend and that a lesser sentence would depreciate the seriousness of the crime. There is no evidence of a judicial abuse of discretion, and the decision of the district court should be affirmed.

CONCLUSION

We find the district court properly overruled the motion to quash and did not err in applying § 60-6,197.03, sentencing Smith for a Class IIIA felony. Given the facts of the case and the statutory guidelines, we find that there was no abuse of discretion and that the sentence imposed was not excessive. The decisions of the trial court are affirmed.

AFFIRMED.